01 1223

Supreme Court, U.S.
FILED
MAY - 3 2002
OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

DICO, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

W. DENNIS CROSS
Counsel of Record
STANLEY A. REIGEL
MARK E. JOHNSON
STINSON MORRISON HECKER LLP
2600 GRAND AVENUE
KANSAS CITY, MO 64108-4606
(816) 691-2600

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF AUTHORITIES

Cases

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 1

General Electric Co. v. Joiner,
522 U.S. 136 (1997) 1

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 1

National Cable Television Ass'n v. United States,
415 U.S. 336 (1974) 5

United States v. Rohm and Haas Co.,
2 F.3d 1265 (3d Cir. 1993) 1, 5, 6

United States v. Serafini,
898 F.Supp. 287 (M.D. Pa. 1994) 5

The brief in opposition, rather than respond to the arguments in the petition, for the most part merely repeats the holdings of the court of appeals and labels them correct. In doing so, it fails to come to grips with two issues of continuing vital concern that this Court should consider and resolve: (1) the limits of district courts' discretion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, to admit and consider expert testimony lacking support in the factual record, and (2) the conflict between the holding of the Eighth Circuit in this case and that of the Third Circuit in *United States v. Rohm and Haas Co.*, 2 F.3d 1265 (3d Cir. 1993).

1. The overarching reason why the Court should grant the petition on the first question presented is that this case is an excellent vehicle for defining, as none of this Court's prior cases has done, the limits of district courts' discretion to admit and rely on expert testimony of dubious reliability. Pet. 11-12, 13, 21. The brief in opposition fails to respond to that argument. Earlier cases have confirmed the discretion of district courts to *exclude* expert testimony, but this case demonstrates the need for this Court to make clear that there are limits on their discretion to *admit* expert testimony that fails to meet the minimum standards of relevance and reliability set forth in *Daubert, General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).[1]

[1] The government's assertion that "[p]etitioner does not contend that the court of appeals' decision conflicts with any decision of this Court" (Brief in Opp. 7) ignores the fact that the petition repeatedly argues that the Eighth Circuit failed to follow the principles laid down by this Court in *Daubert*, *Joiner* and *Kumho Tire*. Pet. i, 3-4, 12-13, 20-21.

(a) In its brief in opposition the government argues, as did the court of appeals in its opinion, that Mr. Robertson did not rely on either his computer model (Br. in Opp. 9) or his soil boring test results (Br. in Opp. 10) for his conclusion that Dico was the major source of TCE contamination of the groundwater under its property. By doing so, the government invites the Court to assume that neither of those bases for Mr. Robertson's conclusion is defensible on its merits. The government fails to acknowledge, however, that without either the computer model *or* the soil boring tests, Mr. Robertson's opinion lacks any basis whatsoever. Given the undeniable (and now undenied) fatal flaws in both of Mr. Robertson's methodologies, there is no doubt that the courts below erred in admitting and relying on his testimony.

(b) The government's only attempt to defend Mr. Robertson's use of the computer model is its statement that he "properly accounted for flowage from the north by programming it into the model as recharge or rainfall." Brief in Opp. 9. The government's statement is absurd on its face. Arbitrarily substituting hypothetical rainfall for actual contaminated groundwater may satisfy the computer's need for balance, but it certainly does *not* prove that the rainfall existed and the contamination did not.

Alternatively, the government claims (as did the court of appeals) that Mr. Robertson did not rely on the computer model, and that his instruction to the computer to assign zero values to flow from the north was therefore harmless. Brief in Opp. 9. This ignores the fact that Mr. Robertson said in his expert report not only that he relied on the computer model but that it was the "only feasible way" to reach a conclusion regarding groundwater flow paths. Pet. 14. And it also ignores the fact that when Dico challenged the soil

boring tests, the district court itself relied on the computer model as an alternative basis for Mr. Robertson's conclusions. Pet. 69a.

(c) When Mr. Robertson programmed the computer to rule out any contamination from the north, DNAPL was the only remaining explanation for the continued presence of TCE in the remediation wells. But the remedial investigation looked for DNAPL and failed to find it. When confronted with that finding at trial, Mr. Robertson, who was not involved in the investigation, disagreed with the statement in the remedial investigation report that DNAPL was not present. When it was pointed out to him that the highest concentration found was only about one percent, far less than the necessary ten percent, he claimed for the first time (and without citing any authority) that one percent was enough to "indicate" the presence of DNAPL. Tr. 149.

The government, in an apparent attempt to minimize the significance of the remedial investigation, refers to it as having been conducted by "petitioner's own consultant." Brief in Opp. 10. In fact, the government *ordered* Dico to retain a consultant to conduct the remedial investigation at Dico's expense, the government reviewed and commented on interim drafts of the report, and the government accepted the final report only after final review and approval by the EPA. The remedial investigation, therefore, was at least as much the government's as it was Dico's, and the engineering firm that conducted it was Dico's consultant only in the sense that Dico paid the bill.

(d) The government does not deny that the soil boring samples were insufficient to support Mr. Robertson's conclusion, or indeed that they were inconsistent with it. Instead, employing the same strategy it uses to

sidestep the issue of the computer model, the government argues that Mr. Robertson did not rely on the soil boring samples in reaching his conclusion. Brief in Opp. 10. Mr. Robertson's own testimony, however, is to the contrary. Tr. 101 (soil borings were the "primary evidence of the continuous contamination").

The government's argument, moreover, is self-defeating. The brief in opposition argues that Mr. Robertson relied on *neither* the computer model *nor* the soil borings to support his conclusions. Brief in Opp. 9, 10. But if that is true, his conclusions had no support whatsoever. The district court, addressing the inadequacy of the soil boring evidence, stated that "[e]ven if the Court disregarded [that evidence] . . . Mr. Robertson's computer modeling . . . provides sufficient evidence of a causal link." Pet. 69a. But neither the district court nor the court of appeals, nor the government in its brief in opposition, explains what is to be done when both the computer model *and* the soil borings are disregarded. The answer is that, without those bases, Mr. Robertson's conclusions lack any basis whatsoever.

(e) The government's only response to the undisputed testimony that TCE in sludge spread on the ground as a dust suppressant would have evaporated long before migrating through the soil (Pet. 16-17) is to repeat the court of appeals' statement that the testimony was disputed. Brief in Opp. 11. The court of appeals, however, like the government, is mistaken: there was no such contradictory testimony. Mr. Robertson did not dispute Dr. Abdul's calculations or his conclusions. His generalized testimony about the weight and viscosity of TCE as compared to water, cited by the court of appeals and the brief in opposition, had nothing to do with the rate at which it would evaporate. On this subject, the courts below committed an error worse than

admitting unreliable expert testimony: they read into Mr. Robertson's testimony opinions he did not even express.[2]

2. The brief in opposition denies that the Eighth Circuit's decision is in conflict with *United States v. Rohm and Haas Co*, 2 F.3d 1265 (3d Cir. 1993), for the same reason the Eighth Circuit tried to distinguish it: that *Rohm and Haas* involved "removal" while this case involves "remedial action," which includes "monitoring." Brief in Opp. 14. As Dico has pointed out, however (Pet. 27-28), "removal" *also* includes "monitor[ing]," and the Third Circuit in *Rohm and Haas* specifically rejected the argument that "monitoring" authorizes recovery of oversight costs. Because the Eighth Circuit accepted that argument, the conflict with *Rohm and Haas* is unavoidable.

The Eighth Circuit expressly disagreed with two holdings of *Rohm and Haas*: (1) its application of *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), to CERCLA and (2) its holding that CERCLA fails to express a clear Congressional intent that oversight costs are recoverable. On the second point, while the Eighth Circuit purported to distinguish *Rohm and Haas* on the ground that it involved "removal" rather than "remedial action," it addressed exactly the same question: whether "monitoring" (part of the definition of both terms) includes oversight costs. In denying that a conflict exists, the brief in opposition does not explain how the two courts' diametrically opposed constructions of the same statutory language can be reconciled. *See United States v. Serafini*, 898 F.Supp. 287,

[2] The petition also pointed to the uncontroverted evidence that, because concrete is an essentially impermeable substance, TCE could not have reached the soil (let alone the ground water) from the concrete containment pit or the concrete slab where drums were filled. Pet. 17-18. The brief in opposition offers no response.

292 (M.D. Pa. 1994) ("we reject any argument that the removal/remedial distinction renders *Rohm and Haas* . . . inapplicable to the facts of this case").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

W. Dennis Cross*
Stanley A. Reigel
Mark E. Johnson
STINSON MORRISON HECKER LLP
2600 Grand Avenue
Kansas City, MO 64108-4606
Tel: (816) 691-2600
Fax: (816) 474-4208

*Counsel of Record